

FACT SHEET

MAY 2000

Section 106 and Historic Preservation

What is Section 106 Review?

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies such as GSA to consider the effects of their actions on Historic Properties. Government-wide regulations included in Title 36 Code of Federal Regulations (CFR) Part 800, "Protection of Historic Properties; Recommended Approach for Consultation on Recovery of Significant Information From Archaeological Sites; Final Rule and Notice," provide guidance on making these evaluations.

What are Historic Properties?

The NHPA defines a historic property as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places. The National Register is a list of known significant historic places maintained by the National Park Service. A wide variety of property types may be eligible for the National Register including: buildings and other structures, archeological sites, Indian and Hawaiian sacred sites, landscapes that have cultural or design values, and districts made up of various individual properties.

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Not all Historic Properties have been included in the National Register, or even identified!

A property can be "eligible" for the National Register even though no one has ever seen it. The African American Burial Ground in New York City, for example, was eligible for the National Register, but no one knew it existed until it was encountered during the planning and preparation for the Foley Square Federal Office Building. GSA spent over \$40 million to comply with the NHPA after this discovery.

What does Section 106 require us to do?

The specific requirements are expressly stated in the regulations, codified at Title 36 CFR Part 800, and can be found on the world wide web at <http://www.achp.gov/>. In brief they are:

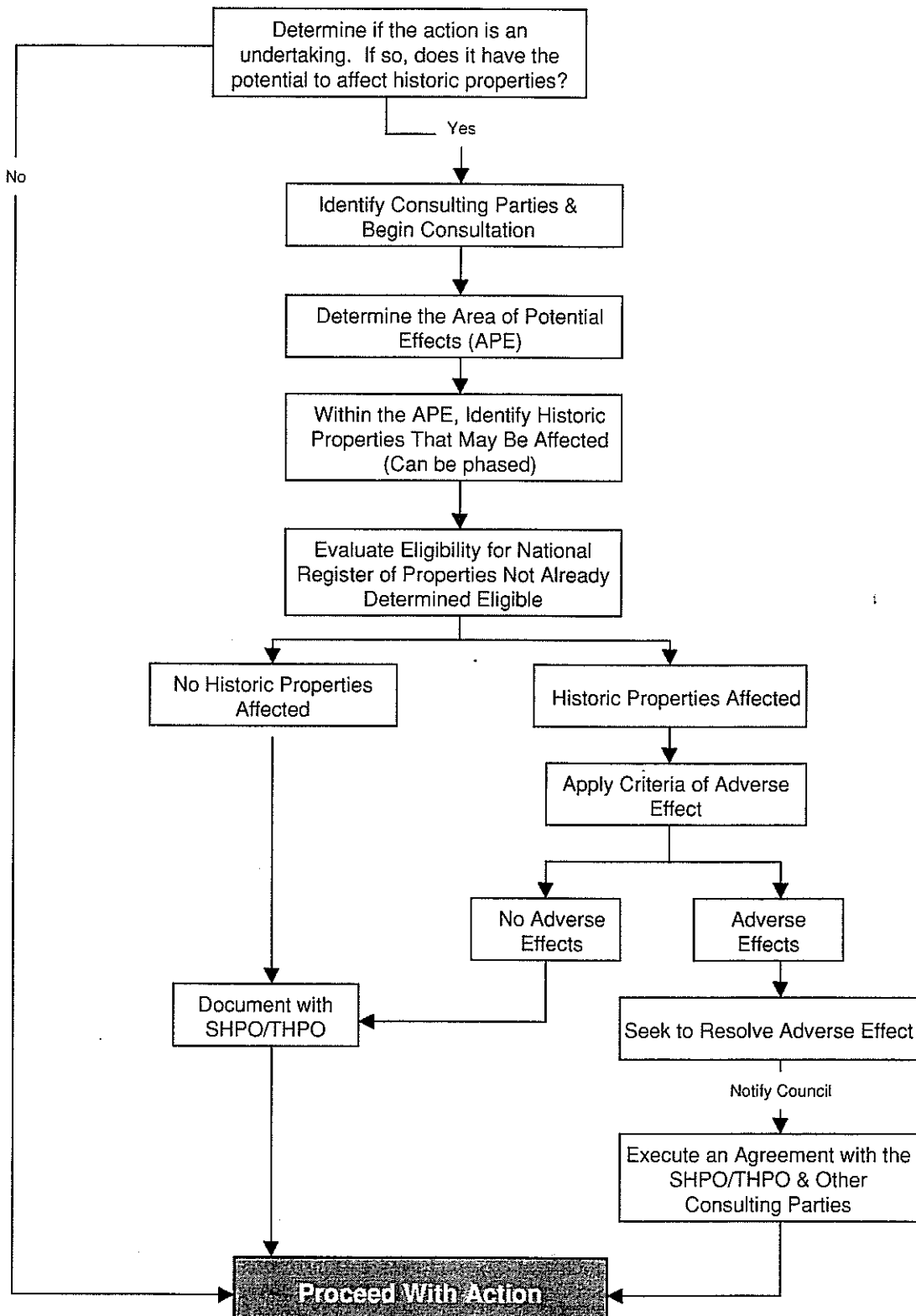
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1. Determine whether the action considered is an "undertaking." An undertaking is anything a Federal agency does, assists, or permits that has the potential to affect historic properties, whether or not such properties have been identified. Examples of GSA undertakings include new federal construction, lease construction, repair or alteration of facilities, property acquisition, and property disposal. Once it has been determined that the action is an undertaking, then GSA must determine whether the undertaking has the potential to affect historic properties. If the undertaking will not have the potential to affect historic properties, then GSA has no further obligations under Section 106.
2. As part of the initial planning, GSA must identify the appropriate State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) (if the THPO has assumed responsibilities on tribal lands) and initiate consultation. GSA, along with the SHPO/THPO, should then identify any other interested consulting parties and plan for public involvement.
3. If the action is an undertaking, determine its "area of potential effect" (APE). This is the geographic area within which the action could affect historic properties, even if there is no knowledge of such properties. The APE may be far larger than the footprint of the project itself. A new office building, for example, may have visual effects, or cause changes in traffic patterns, or create economic changes in a wide area.
4. Within the APE, identify historic properties that may be affected. This usually involves background research; consultation with the SHPO (see below), THPO (see below), and other interested parties; as well as fieldwork such as architectural or archeological surveys. Remember that not all historic properties are known; often, we have to uncover them.
5. Properties that may be historic are evaluated using the "National Register Criteria" established by the National Park Service, in consultation with the SHPO/THPO, tribe, and/or Native Hawaiian group. GSA and the SHPO/THPO should come to an agreement on whether the properties are eligible for the National Register. Failure of GSA to reach an agreement with the SHPO/THPO requires GSA to obtain a formal determination of eligibility from the Keeper of the National Register. The National Register Criteria can be found on the world wide web at www.achp.gov/criteria.html.
6. If it has been determined that the undertaking will have no effects on historic properties or that there are no historic properties affected, GSA is required to provide documentation to the SHPO/THPO and all other consulting parties prior to approving the undertaking. If it has been determined that historic properties will be affected by the undertaking, GSA must continue with the Section 106 process.
7. Apply criteria of adverse effects. Determine what effects the action will have, if any, on historic properties. Effects may be obvious (demolishing a building or disturbing an archeological site), but may also be difficult to assess at first glance. In one case, local residents feared that the effect of a courthouse expansion would be to attract lawyers to the surrounding historic neighborhood, resulting in the conversion of old houses to law offices. GSA determines the effect of the action in consultation with the SHPO/THPO, the public, and others using the criteria included in section 800.5 of the regulations.
8. Seek to resolve any adverse effects. Through further study, consideration of alternatives, and consultation with the SHPO/THPO and others, we try to find ways to resolve or mitigate any adverse effects on historic properties. Some typical means of resolving adverse effects include project relocation or redesign, following appropriate rehabilitation standards when renovating a historic building, and preparing architectural or archeological documentation.
9. Execute an agreement. The regulations provide for executing various kinds of agreements, most commonly a Memoranda of Agreement (MOA), which stipulates how adverse effects will be resolved. This MOA is signed by the GSA official responsible for the action (usually the Regional Administrator), by the SHPO/THPO, sometimes by the Advisory Council on Historic Preservation (ACHP) if they have entered into consultation, and sometimes by others (local government officials, Indian tribes, or other interested parties).
10. Implement the agreement. Whatever was agreed upon, must be carried through. Ways to implement the MOA must be built into the contract and other project planning documents.

The Basic Steps of Section 106 Review



What is the SHPO?

The SHPO is a state official appointed by the governor who coordinates historic preservation activities in his or her state. The regulations give the SHPO specific responsibilities and authorities in Section 106 review. Federal agencies are required to consult with the SHPO at virtually every step in the Section 106 review process.

What is the THPO?

The THPO is the tribal official appointed by the tribe's chief governing authority or designated by the tribal ordinance or preservation program. The THPO is the official representative of an Indian tribe and may assume the SHPO's responsibilities for purposes of Section 106 review for undertakings occurring on or affecting historical properties on tribal lands. Even if the designated tribal representative has not officially assumed the SHPO's Section 106 responsibilities on tribal lands, GSA must consult with the THPO for these actions.

What is the ACHP?

The ACHP is an independent Federal agency that oversees Section 106 review, and advises the President and Congress about historic preservation matters. It is comprised of a 20-member council of presidential appointees, agency head (including, as of 1997, the GSA Administrator), and others, in addition to a staff of about 35. The ACHP has offices in Washington, D.C. and Denver, Colorado.

What is the ACHP's Role in Section 106 Review?

The revised Section 106 regulations provide greater deference to Federal agency-SHPO decision making, in addition to more focused Council involvement. The Council will no longer review decisions agreed to by the Federal agency and the SHPO/THPO, unless specifically requested to or when the Council determines its involvement is necessary to ensure that the purposes of Section 106 are met. Instead, the Council will focus on the overall review of Section 106 compliance actions, such as when an undertaking:

- Has substantial impacts on historic properties;
- Presents important questions of policy or interpretation;
- Has the potential for presenting procedural problems; or
- Presents issues of concern to Indian tribes or Native Hawaiian organizations.

How is Section 106 Review Related to NEPA?

The new regulations encourage GSA to integrate Section 106 review with reviews required under National Environmental Policy Act (NEPA) and related issues. Specifically, under the new regulations, GSA is authorized to use the preparation of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) under NEPA to meet Section 106 needs in lieu of following the specified Council process. This provision allows for agencies with well-developed NEPA processes to streamline current reviews, reduce costs to applicants, and avoid redundant paperwork. If GSA is to use its NEPA guidance to comply with Section 106, then it must notify the SHPO/THPO and the Council that it intends to do so and meet the following standards:

- Identify consulting parties either through Section 106 regulations or through the NEPA scoping process;
- Identify historic properties and assess effects consistent with Sections 800.4 and 800.5 of the regulations;
- Consult with usual parties;
- Involve the public in accordance with GSA's published NEPA procedures; and
- Develop alternatives and mitigation measures in consultation with consulting parties and describe them in the EA or Draft EIS.

When Should Section 106 Review be Initiated?

Section 106 Review should begin as early as possible in planning any action. Review should be conducted while there are plenty of project alternatives open for consideration, and it should be carefully coordinated with the broader review of environmental impacts under NEPA. Review **MUST** be completed before a final decision is made with regard to the action. Failure to do so may result in "foreclosing the ACHP's opportunity to comment." A foreclosure finding by the ACHP is one way to open the GSA to third party lawsuits, and is inadvisable.

Pertinent Authorities Applicable to Historic Preservation

National Historic Preservation Act: Requires agencies to identify historic properties subject to effect by their actions, and to consult with the State Historic Preservation Officer and others about alternatives and mitigation.

PBS Order 1022.2 Procedures for Historic Properties:

GSA PBS Order designed to comply with 36 CFR 800, to ensure the preservation of the integrity of each GSA historic structure, and to make optimum use of GSA manpower, time, and money without duplication of efforts. It establishes early in-house review procedures pertaining to proposed actions affecting GSA historic structures; establishes guidelines that will ensure that specific material deterioration or cosmetic problems of specific buildings are met with the most appropriate and practical conservation methodologies that can only enhance the historic, physical and cosmetic integrity of the structure and its materials; and establishes guidelines and criteria that the best qualified conservators, designers, or specialist construction contractors are requested and selected. The Historic Buildings and the Arts Center of Expertise is currently revising this order.

National Environmental Policy Act: The National Environmental Policy Act of 1969 (NEPA) was created to ensure that Federal agencies consider the environmental impacts of their actions and decisions. NEPA requires all Federal agencies to consider the values of environmental preservation for all significant actions and prescribes procedural measures to ensure that those values are in fact fully respected. Federal agencies are required to systematically assess the environmental impacts of their proposed actions and consider alternative ways of accomplishing their missions which are less damaging to the environment. Multidisciplinary identification and analysis of impacts is also required.

Executive Order 13006: "Locating Federal Facilities on Historic Properties in Our Nation's Central Cities," Executive Order (EO) 13006, stipulates that Federal agencies must give priority to the use of historic buildings in historic districts in Central Business Areas (CBAs). If there is no suitable historic building in the historic CBA, then Federal agencies must consider compatible new construction in the historic CBA. If either of these two options is not feasible, then the agency may look outside the CBA to other historic buildings. However, all selected properties must meet the agency's missions and needs.

Abandoned Shipwrecks Act: The Abandoned Shipwrecks Act asserts Federal ownership of abandoned shipwrecks in the territorial waters of the U.S. if they are included in the National Register, determined to be eligible for the National Register, or embedded in the sea floor or coral. GSA routinely (or in most cases GSA) transfers management authority of these vessels to the

states, so that the states can regulate access to and use of most historic shipwrecks in their waters.

Antiquities Act of 1906: The Antiquities Act of 1906 was enacted to give the President of the United States authority to set aside Federally-owned land containing historic and/or prehistoric structures and objects of historic or scientific interest as historic landmarks. Also, private lands may be relinquished to the Federal Government for similar preservation. Under this Act, the Secretaries of the Interior, Agriculture, and War can issue permits for the examination of ruins, excavation of archeological sites, and collection of objects of antiquity on lands they administer. Permit requirements under this Act are still in effect; however, most of its provisions have been superseded by the permit requirements of the Archeological Resource Protection Act of 1979 (ARPA).

American Indian Religious Freedom Act: The American Indian Religious Freedom Act of 1979 (AIRFA) requires that a Federal agency respect the practice of traditional Native American religious practices, including access to religious sites and use of ceremonial items, and the effects the agency's actions may have upon them. The agency can impose respect for such practices on the public only within very proscribed limits.

Archeological and Historic Preservation Act: The Archeological and Historic Preservation Act of 1974 (AHPA), also known as the Archeological Data Preservation Act or the Moss-Bennett Act, is an amendment to a 1960 statute that pertains to archeological salvage at dam sites. The Act protects archeological, historic, and scientific data that is threatened by Federal, federally assisted, and federally licensed projects. This Act requires Federal agencies to report to the Secretary of Interior any actions that threaten archeological, scientific, or historical data. If damage or destruction to data may occur the Federal agency may either recover it themselves or request the Department of the Interior (DOI) to remove the data. The Federal agency must assist the DOI and transfer up to one percent of the project costs to DOI to aid DOI in the recovery.

Archeological Resources Protection Act: The Archeological Resources Protection Act (ARPA) prohibits unauthorized removal or excavation of "archeological resources" on Federal or tribal land without a permit, and provides for civil and criminal penalties for such actions. The Act also establishes standards for obtaining permits for the removal of "archeological resources."

Executive Order 13007: EO 13007, "Protection and Accommodation of Access to 'Indian Sacred Sites'" requires Federal agencies to seek ways to avoid physical damage to 'Indian Sacred Sites' and avoid blocking access to them by Indian religious practitioners. All Federal agencies are required to develop and implement policies that would be in accordance with the EO, and they are to advise the President on any changes that are needed within the EO. It should be noted that this EO does not apply exclusively to historic properties.

Native American Graves Protection and Repatriation Act: The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) requires the repatriation of human remains and "Native American cultural items" to Native American tribes and Native Hawaiian groups. The law imposes major requirements on agencies to consult with tribes and Native Hawaiian groups regarding the treatment of their ancestral remains and objects. It also requires that if cultural items are found during a project on Federal or tribal land, the project must be stopped for 30 days while consultation is carried out with the appropriate group and a decision made about the discovery.

In Summary:

- Section 106 applies to a very broad range of GSA actions, including acquisition, disposal, repair, alteration, leasing, and new construction.
- Section 106 requires GSA to consider potential impacts on a wide range of historic property types (building, archeological sites, districts, etc.), including both known and unknown properties.
- Section 106 review must be initiated early in planning and completed before a final decision is made.

Further Information on Section 106 of the NHPA

NEPA Call-In has developed an interactive training tool to help GSA realty specialists, asset managers, and others learn how to comply with Section 106 of the NHPA. This can be accessed via the NEPA Call-In world wide website at (<http://www.gsa.gov/pbs/pt/call-in/envbook/ebook.htm>). GSA's Regional Historic Preservation Officers (RHPO) are the Section 106 contacts within each region. For the name of your RHPO, please contact the Historic Buildings and the Arts Center of Expertise at (202) 501-9156 or by email to caroline.alderson@gsa.gov. Additional information on Section 106 and historic preservation is also available from NEPA Call-In at (202) 208-6228.

NEPA Call-In is GSA's National Environmental Policy Act (NEPA) information clearinghouse and research service. NEPA Call-In is designed to meet the NEPA compliance needs of GSA's realty professionals.

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